Court of Appeals No. 46875-1-II

Trial Court No. 12-2-00113-0

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

JOHN A. HIVELY,

Appellant,

v.

PORT OF SKAMANIA COUNTY, WASHINGTON, a Washington municipal corporation,

Respondent.

BRIEF OF RESPONDENT

EVANS, CRAVEN & LACKIE, P.S.
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I. COUNTERSTATEMENT OF CASE

A. General Nature of Case and Identity of Parties

This is a premises liability case. It arises from a September 26, 2009, fall taken by John Hively (Appellant and Plaintiff below, referred to herein as "Mr. Hively") on a public path/trail owned by the Port of Skamania County (Respondent and Defendant below, referred to herein as "the Port").

B. Pertinent Facts

The Port, a Port District created and operated under RCW Title 53, is located within the city limits of Stevenson, Washington, on the north bank of the Columbia River. (*CP 51*) The Port owns and maintains approximately six acres of park land, 1.5 miles of waterfront, and 1.1 miles of walking paths with interpretive signs and amenities. (*CP 52*) Three of the Port's park properties are on the north bank of the Columbia River: Bob's Beach, Teo Park and Stevenson Landing. (*Id.; CP 56-59*)

A path or trail along the riverbank connects the parks. (*CP 52, CP 74*) The trail was built in 1997. (*CP 52*)

The Bob's Beach, Teo Park and Stevenson Landing amenities include a restroom, (*CP 52, 57, 59, 68*) also built in 1997 by the same contractor who built the trail. *(CP 52)* This restroom is open to the public,

although it is usually winterized and closed during the winter season to prevent the pipes from freezing. (*Id.*)

Bob's Beach, Teo Park, Stevenson Landing, the Stevenson Landing Pier, and the waterfront path are all open to the public, free of charge. (*CP 53*) The Port does charge cruise ships a fee for mooring at the Stevenson Pier. (*Id.*) In addition, the Port has, on occasion, rented Teo Park to wedding parties or organizations that put on civic festivals such as Blues, Brews and BBQ festival. (*Id.*) When the Port does that, the individual or entity to whom the Port rents the park is entitled to its exclusive use. However, they are not entitled to exclusive use of the waterfront path or the restroom, and those areas remain open to the public. (*Id.*) Likewise, although cruise ship operators are required to pay a fee for docking at the Stevenson Pier, that fee does not affect the ability of members of the public to use the pier without paying a fee. (*Id.*) Members of the public who are simply utilizing the park property for picnicking or sightseeing often walk out onto the pier to view the scenery and/or take pictures. (*Id.*)

When the riverbank trail was built in 1997, it was surfaced with asphalt. (*CP 53, CP 70, CP 72*) Over time, however, the roots of trees near the riverbank caused the asphalt surface to heave up, and in places, break and become irregular. (*Id.*) Because of this by the fall of 2009, the path

became more like a natural trail, consistent with the rough and/or natural trails in other parts of the park. *(CP 53, CP 70, CP 72, CP 76, CP 78, CP 80, CP 82)*

The accident happened when Mr. Hively was visiting Stevenson from his home in Ohio. (*CP 33-40*) He and a companion went down to the Stevenson Landing Pier, and Mr. Hively waited while his companion walked out onto the pier.(*CP28-32)* When his companion came off the pier, both began walking east on the subject path/trail. (*CP 40*) Mr. Hively was in the lead, with his companion following. (*Id.*) As Mr. Hively was walking along the path, he stepped into or upon an irregularity in the surface of the path and fell. (*CP 41, CP 50*)

When Mr. Hively stepped into or upon the irregularity, his eyes were focused straight ahead. (*CP 41*) As he was walking down the path towards the spot where the accident happened, Mr. Hively did not notice any irregularities in the asphalt. Likewise, he did not believe he noticed any unevenness in the pavement. (*CP 42, 43*)

Mr. Hively did not see the pavement irregularity before he fell, and he has no idea why. (*CP 46, 47*) His only explanation is that he "didn't expect it to have a hazard in his way." (*CP 47*)

As of September 2009, even though portions of the riverbank trail, including the area where Mr. Hively fell, were rough and irregular, the

Port did not consider these areas to be dangerous, since the condition was open and obvious and consistent with other rough or natural trails on Port park property. *(CP 54)* The Port's receipt of Mr. Hively's Notice of Claim in July of 2012 was the Port's first notice of anyone tripping and falling on the waterfront trail. (*Id.*)

To access the restroom located near the Stevenson Landing Pier, it is not necessary to use the riverbank path/trail. *(CP 93, 97-98)* The main access to the restroom is a paved walkway that extends to the restroom from the asphalt paved, Russell Street right-of-way that leads down the pier.*(Id.)* This walkway existed at the time of the incident on September 26, 2009. (*CP 93*)

C. Pertinent Trial Court Procedure

The trial court granted Summary Judgment in favor of the Port based on Washington's recreational use immunity statue, RCW 4.24.210. *(CP 134-137)* Although he argued issues of fact existed which precluded summary judgment in favor of the Port, Mr. Hively crossed-moved for summary judgment.*(CP 144-166)* The court denied Mr. Hively' s motion. *(CP 138)* This appeal followed.

II. ARGUMENT OF AUTHORITIES

A. Standard of Review

A Summary Judgment order is reviewed de novo, with the appellate court engaging in the same inquiry as the trial court. *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary Judgment is proper if the records filed with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law" CR 56(c).

B. Purpose and General Objective of RCW 4.24.210

Washington's recreational use immunity statute, RCW 4.24.210, states, in pertinent part:

> [A]ny public or private landowners . . . or others in lawful possession and control of any lands... who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, picnicking, swimming, hiking . . . winter or water sports, viewing or enjoying historical, archeological, scenic or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users. (emphasis added).

This statute creates an exception to the common law regarding premises liability, particularly with respect to the duty owed to public invitees. *Camicia v. Howard S. Wright Construction Company*, 179 Wn.2d 684, 694, 317 P.3d 987 (2014). The legislative purpose behind RCW 4.24.210 is to immunize landowners who allow members of the

public to use certain lands "for the purposes of outdoor recreation" from liability from most injuries. *Id.* The statute carves out an exception to the common law "public purpose" invitee doctrine by exempting a particular "public purpose"—outdoor recreation. *Id.* The legislature expressly intended that the statute would "encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability for persons entering thereon." *Id.* at 695, citing RCW 4.24.210.

C. The Trail Was Open to Members of the Public, For Recreational Purposes and No Fee of Any Kind Was Charged for the Public's Use of the Trail

As a threshold matter, for immunity under RCW 4.24.210 to apply, the land in question must be "(1) open to members of the public (2) for recreational purposes and (3) no fee of any kind was charged." *Camicia,* 179 Wn.2d at 695-96, citing *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 284, 285 P.3d 860 (2012).

Here, the trail where the accident occurred was open to members of the public for recreational purposes. Further, no fee has ever been charged to members of the public for using the riverbank path/trail. Thus, the basic requirements for application of the statute set forth in RCW 4.24.210(1) are established.

Mr. Hively argues the statute does not apply because the Port charges a fee for specific uses of certain areas of park property, such as the moorage fee charged to cruise boat operators for docking at the Stevenson Landing Pier. This argument is not well taken.

A landowner may charge a fee for something other than use of the land, and still enjoy recreational use immunity. *Plano v. City of Renton*, 103 Wn. App. 910, 914, 14 P.3d 871 (2000), citing *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982)(In *Jones*, the plaintiff injured herself in the Hurricane Ridge area of Olympic National Park while snow sledding on an inner tube she had rented from the park for a fee. The inner tube rental fee was not a fee charged for the entrance upon or use of the land on which the injury occurred).

Also, a landowner may charge a fee for public use of a portion of its recreational land without losing immunity for public use of the remainder. *Plano* 103 Wn. App. at 914, citing *Kleer v. United States*, 761 F.2d 1492 (11th Circ. 1985)(In *Kleer*, the plaintiff was injured while diving from a bridge in an undeveloped portion of the Ocala National Forest. There was no fee for using this area. The court found immunity despite the fact that the government charged fees in developed areas of the National Forest).

In *Plano*, the injury occurred on a metal ramp leading to a boat moorage dock. 103 Wash. App. at 911. The defendant, the City of Renton, charged fees for boater's using the moorage. Two metal ramps leading from the shore to the dock were the only way the dock could be accessed by someone on foot. Thus, anyone accessing or departing the dock on foot by necessity had to use the metal ramp. Because the court considered the metal ramp to be an "integral part" of the dock, for which the City of Renton charged user fees, the court held the recreational immunity statute did not apply.

Plano is distinguishable from the instant case. The Port has never charged a fee of any kind for public access to and use of the riverbank path/trail where the accident occurred. The Port does charge tour boat operators a fee to dock at the Stevenson Landing pier. However, pedestrian members of the public are not required to use the subject path to access the pier, and the pier is open to the public without a fee or charge of any kind. Thus, it cannot be said that the area of the riverfront path/trail where the accident occurred is an "integral part" of the Stevenson Landing pier.

The Port also, from time to time, rents Teo Park to groups like wedding parties and the organizers of civic events like Blues, Brews and BBQ, for their exclusive use. But, again, the area of the riverbank

path/trail where the accident occurred is distant from, and not necessary for, access to Teo Park. Thus, it cannot be said that the area of the riverfront path/trail where the accident occurred is an "integral part" of Teo Park.

Mr. Hively strains to bring this case within the scope of Plano by attempting to tie the path/trail to the public restroom. The argument is that, because the restroom is "integral" to the public's use of the pier and/or Tao Park and because the portion of the path/trail where the accident occurred can be used to access the restroom, immunity does not apply. This argument should be rejected for a number of reasons. First, obviously the accident did not occur in the restroom. Second, the Port does not charge members of the public a fee to use the restroom. Third, persons using the restroom are not required to walk over that portion of that path/trail where the accident happened. Fourth, the restroom is not a "necessary and integral" part of the pier or Tao Park. That is, passengers who disembark a ferry docked at the pier are not required to use the restroom. Likewise, persons using Tao Park are not required to use the restroom. Fifth, and finally, the logical extension of Mr. Hively's argument is that if some portion of recreational-use property, like a park, is occasionally rented out for a fee, and the property includes a restroom open to all users of the entire property free of charge, the statute does not

apply. Statutes should be construed to avoid strained, absurd or unlikely consequences. *Ski Acres Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992).

In many ways this is a case like *Kleer v. U.S.*, 761 F.2d 1492 (11th Cir. 1985), cited in *Plano, supra.* In *Kleer* the Court held that, under Florida's recreation use statute, immunity was not abrogated simply because the defendant charged a fee for entry to or use of one area of the property, stating:

> The statute seeks to effectuate its purpose by limiting the liability of those landowners who make their land available to the public without charge. Kleer argues that the intent of the exception found at subsection (2)(b) is to deny the statute's protection to landowners who either charge a fee for use, or conduct commercial activity on, any part of their land. Kleer overlooks two important points. First, the phrase "park area" denotes something less than the entire parcel of land. Second, under Kleer's construction of subsection (2)(b), a landowner could invoke the protection of the statute only if his entire parcel of land was dedicated to the public, without compensation. Clearly, this construction of the statute would not encourage landowners to make their land available to the public.
>
> Kleer's analysis of the statute is contrary both to the "plain meaning" of the language of the statute and to the express purpose of the statute." (emphasis added).

761 F.2d at 1495.

The instant case is also similar to *Zuk v. U.S.*, 698 F.Supp. 1577 (S.D. Fla. 1988). There, the plaintiff, a visitor to Fort Jefferson National Monument, was injured when he fell off an open arch while participating

in a self-guided tour of the Fort property. No fees were charged for entrance or admission to Fort Jefferson. The plaintiff claimed Florida's recreational immunity statute did not apply, however, because the federal government charged a $50 fee for two-year special use permits used by charted sea planes as well as fishing and dive boats. Books, postcards and photographs were also sold by a non-profit cooperating organization on the premises, revenues of which went to the non-profit. The plaintiff argued, among other things, these fees and commercial activity prevented application of Florida's recreational immunity statute. The court rejected this argument, stating:

> The clear intent of Florida statute section 375-251 is, by it terms, to encourage persons to make their land available to the public for outdoor recreational purposes by limiting the liability of those persons. (citation omitted). Plaintiff's construction of the statute is contrary to the very purpose of Florida statute section 371-251. *See Kleer*, 761 F.2d at 1495. In the present case, it is undisputed that no commercial activity took place in the distinct area of Fort Jefferson where plaintiff sustained injuries. As such, the "commercial activity" exception to the Florida recreational use statute does not apply to bar the statute's application in the instant case. *Kleer, supra.*
>
> Therefore, since no fee is charged by the government for entrance to or for use of the park and no "commercial activity" occurred in the distinct area where plaintiff was injured, Florida statute section 375.251 applies to bar the instant FTCA action.

698 F.Supp. at 1582.

Here, the area of the riverbank trail/path where the accident occurred is not a "necessary and integral" part of those areas of the overall park property for which the Port charges a fee. Unlike the metal ramps in Plano, the path/trail does not exist to provide access to Tao Park or the pier. Despite Mr. Hively's effort to place the facts of this case within the holding of *Plano*, that case does not apply.

D. Whether the Port Charged a Fee for Use of the Premises at Issue is a Question for the Court

After arguing the court should determine as a matter of law that the Port charged a fee for use of the path/trail where the accident occurred, Mr. Hively asserts, in the alternative, whether the Port charged a fee for use of the path/trail at issue is a question of fact for the jury. On this point, Mr. Hively relies on *Voss v. United States*, 2006 WL 223746 (WD Wash.). However, Mr. Hively's reliance on *Voss* is misplaced.

There, the Voss family visited the Lava Canyon Recreation site in the Gifford Pinchot National Forest. As a condition of entering the recreation site, the family was required to purchase a Northwest Forest Pass "Day Pass" and display the permit on their vehicle. Tragically, while using the recreation area, two members of the Voss family fell into the Muddy River and were swept to their deaths.

In the wrongful death case against it, the United States argued it was immune under Washington recreational use statute, RCW 4.24.210. The plaintiff argued the statute did not apply because the "Day Pass" was a fee charged by the defendant for the public's use of the property where the accident occurred. The United States countered that the "Day Pass" was a parking fee only, not a usage fee for the property, relying on a line of cases holding that parking fees do not abrogate recreational immunity.

The court denied the United States' motion for summary judgment, ruling an issue of fact existed as to whether the "Day Pass" was a parking fee or a fee for use of the property at issue.

In the instant case, again the Port does not charge a fee of any kind to members of the public for their use of the riverbank path/trail where the accident occurred. Accordingly, *Voss* is simply inapposite.

E. The Injury Causing Condition Was Not Latent (Hidden)

Even if the threshold requirements set forth in RCW 4.24.210(1) are satisfied, there is an exception to the immunity grant. RCW 4.24.210(4)(a) states:

> Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injury sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

The test for latency under the statute is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 187 P.3d 345 (2008). Under this definition, Washington courts have found the following conditions not "latent" within the meaning of the statute:

- Displaced and compacted wood chips in the landing area of a giant slide in a city park playground. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 187 P.3d 345 (2008).

- The close proximity of walkways on a bridge to vehicular traffic and thus the danger to pedestrians of crossing the bridge in mid-span. *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 901 P.2d 344 (1995).

- A piece of caterpillar-shaped playground equipment in a city park. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993).

- A missing cover on playground merry-go-round that exposed internal mechanism. *Preston by Preston v. Pierce County*, 48 Wn. App. 887, 741 P.2d 71 (1987).

- Tracks for a device used to raise floodgates for dam. *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 774 P.2d 1255, rev. denied, 113 Wn.2d 1020 (1989).

- In addition, an uneven concrete walkway was held to not be a latent defect for purposes of landlord's liability to tenant in *Howard v. Horn*, 61 Wn. App. 520, 810 P.2d 1387 (1991).

Here, the irregular surface of the riverbank trail/path in the area where Mr. Hively fell, and the specific irregularity which caused him to fall, were readily apparent to the general class of recreational users. Thus, the RCW 4.24.210(4) exception does not apply.

F. Whether the Condition at Issue was Latent was Properly Decided by the Trial Court as a Matter of Law

Mr. Hively argues that whether the condition at issue was "latent" within the meaning of the statute is a question of fact for the jury, relying on *Ravenscroft v. Washington Power Company*, 136 Wn.2d 911, 969 P.2d 75 (1998) and *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999). This argument should be rejected.

Ravenscroft actually supports the Port's position. There, the condition at issue was a fully submerged stump the plaintiff hit with his boat. In discussing the issue of latency, the court observed that "[u]nder a traditional common law premises liability analysis, the court determines whether the danger of risk associated with a body of water is obvious, or open and apparent. (citation omitted). However, under the recreational use statute, the question is whether the injury-causing condition – not the specific risk it poses – is readily apparent to the ordinary recreational user." *Ravenscroft*, 136 Wn.2d at 924-925 (citing *Van Dinter*, 121 Wn.2d at 46, 846 P.2d 522).

The *Ravenscroft* court continued on with a survey of Washington cases, stating:

- In *Van Dinter*, this court held that the caterpillar toy "as well as its injury-causing aspect – its proximity to the grassy area – were obvious. The condition that caused Van Dinter's injury was not latent." *Van Dinter*, 121 Wn.2d at 46, 846 P.2d 522. [summary judgment in favor of the defendant affirmed.]

- In *Widman*, the court held that the inner section of a logging road and a state highway is readily apparent to the general class of recreational users. *Widman*, 81 Wn. App. at 115, 912 P.2d 1095. [summary judgment in favor of the defendant affirmed.]

- In *Chamberlain*, the court held that the proximity of a walkway to vehicular traffic on the scenic overlook bridge was an obvious condition and therefore not latent. *Chamberlain*, 79 Wn. App. at 219-20, 901 P.2d 344. [summary judgment in favor of the defendant affirmed.]

- In *Tennyson*, the court held the excavation of gravel mound "was in plain view and readily apparent to anyone who examined the gravel mound as a whole;" the particular recreational users' failure to discovery the condition had no bearing on whether the condition was latent. *Tennyson*, 73 Wn. App. at 555-56, 872 P.2d 524. [summary judgment in favor of the defendant affirmed.]

- In *Gaeta*, the court held that the condition was not latent because the track across the top of the dam "were obvious." *Gaeta*, 54 Wn. App. at 610, 774 P.2d 1255. [trial court's granting of defendants motion to dismiss affirmed.]

- In *Riksem*, the court held that the nature of a trail used by a joggers, pedestrians and cyclists was obvious from viewing the trail and that the mixed-used condition was, therefore, not latent. *Riksem*, 47 Wn. App. at 511, 736

> P.2d 275. [summary judgment in favor of the defendant affirmed.]

136 Wn.2d at 925.

On the facts before it, because the stump which the plaintiff hit was submerged, the *Ravencroft* court concluded that the record did "not support a conclusion that the submerged stumps near the middle of the channel were obvious or visible as a matter of law." 136 Wn.2d at 926. Given that, the question of latency was a question of fact, and an order of summary judgment was not appropriate on that issue. *Id.*

The instant case is unlike *Ravenscroft*, where the injury causing condition was hidden or invisible. Rather, this case involves facts like those in the Court of Appeals cases listed in *Ravenscroft* – the injury causing condition – the irregularity in the trail – was in plain view and readily apparent to anyone examining the path/trail. Mr. Hively may not have noticed the defect/irregularity. But as emphasized by the courts many times, the particular recreational user's failure to discover the condition has no bearing on whether the condition is latent.

Cultee is equally inapposite. 95 Wn. App. 505, 977 P.2d 15 (1999). There, the City of Tacoma owned a property called the Nalley Ranch which contained a number of roadways. Because of a broken levy, the roadways, two times a day, were bordered by, or covered by, tidal waters.

Five year old Reabecka was riding her bicycle on the farm roads with her cousins when the group rode onto a road covered by approximately two to four inches of muddy water. The children dismounted their bikes to turn around. As Reabecka was mounting her bike, she was too close to the edge of the road and fell into the deeper water that bordered the road and drowned.

In the subsequent wrongful death action against the City, the trial court granted summary judgment in favor of the City, ruling that: (1) if RCW 4.24.210 did not apply, Reabecka was a trespasser and the City had no duty to warn, to prevent access, or to take affirmative steps and that: (2) if the statute did apply, the tidal waters were a "natural" condition and, thus, the City was immune. *Cultee,* 95 Wash. App. at 512.

On appeal, Division 2 reversed on the issue of whether the condition that caused Reabecka's death was "latent" the court, relying heavily on *Ravenscroft*, rejected the City's contention that the condition that resulted in Reabecka's death was merely the water on the road and that this condition was not latent. The plaintiff argued the "condition" at issue was not simply muddy water, but muddy water on the road, and the hidden, eroded road edge and steep drop off into deep adjacent water. On these facts, the Court of Appeals determined it could not say, as a matter of law, that the condition that killed Reabecka was not latent. Here, unlike

the submerged eroded road edge in *Cultee*, the trail surface irregularity was not hidden from view.

Hively also argues that the condition at issue was latent because, at the time of the accident, it was obscured or made difficult to see by shadows. This argument should be rejected for two reasons.

First, there are no cases supporting the proposition that, under the statute, a condition can be occasionally latent depending on lighting conditions. If lighting conditions could render an otherwise patent condition latent, then immunity would never apply to an accident that happened at night, when an otherwise patent condition was difficult or impossible to see.

Second, aside from the issue of latency, there is no evidence that the Port knew, in late September 2009, that the condition at issue difficult to see because of shadowing. *Ertle v. State*, 76 Wn. App. 110, 882 P.2d 1185 (1994) is directly on point. There, the plaintiff was riding a bicycle through Riverside State Park in Spokane when he hit a pothole and fell. Before the accident, a park ranger had noticed the pothole, but he ignored it because "it was not a safety hazard, anything to be concerned about." 76 Wn. App. at 111. The plaintiff argued the pothole was latent because, at the time of the accident, it was obscured by a shadow. In affirming summary judgment in favor of the State, the court stated:

> Mr. Ertle presented no evidence the State actually knew the pothole was obscured by shadows at times. In fact, the only other direct evidence in this record is that of Ms. Weisenburger [the plaintiff's cycling companion], who saw the pothole just prior to Mr. Ertle's accident. Without a prima facie showing of actual knowledge, there is no genuine issue of fact and the trial court properly granted summary judgment for the State. (citations omitted).

76 Wn. App. at 115.

Here, like in *Ertle,* there is no evidence the Port knew that shadowing made the trail surface irregularity at issue difficult to see. Thus, the shadowing irregularity was not a "known" dangerous condition within the meaning of the statute.

III. CONCLUSION

Based on the foregoing argument and authorities, the Port respectfully requests that the trial courts granting of its motion for summary judgment and denying of Mr. Hively's motion for summary judgment be affirmed.

DATED this 19th day of May, 2015

EVANS, CRAVEN & LACKIE, P.S.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 19 day of May, 2015, the foregoing was delivered to the following persons in the manner indicated:

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VIA REGULAR MAIL [X]
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VIA FACSIMILE [ ]
HAND DELIVERED [ ]
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5/19/15 /Spokane, WA
(Date/Place)

Amy S. Calkins